No. 11449

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Summary of the Board's position

In view of various statements in the briefs of respondent and the A. F. L., it seems pertinent to summarize here the Board's position with respect to the so-called *Midwest Piping*[1] rule which the Board has applied in this case.

The rule is that when an employer knows that a question concerning the representation of his employees is pending before the Board, he may not lawfully make a new contract, or extend or renew an existing contract with a union, whether the contract provides merely for exclusive recognition of the union, or for a closed shop. The *Midwest Piping* case, *supra,*

[1] *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 1063.

Matter of Phelps Dodge Copper Products Corporation, 63 N. L. R. B. 686, 687; National Labor Relations Board, *Tenth Annual Report* (Gov't Print. Off., 1946), pp. 38–39; *Eleventh Annual Report* (1947), pp. 35–36; *Twelfth Annual Report* (1948), p. 26.

Where, in such circumstances, an employer does enter into an exclusive recognition contract with a union, he contravenes the requirements of the Act by aborting the procedure established for the ascertainment of the employees' free choice, and thereby interferes with the exercise of their right to make their own unhampered selection. As the Board stated in its *Tenth Annual Report, supra,* p. 39, the basis for the *Midwest Piping* rule is as follows:

> Congress has clothed the Board with the exclusive power to investigate and determine bargaining representatives. Consequently an employer may not disregard the jurisdiction of the Board and preclude the holding of an election under Board auspices, by resolving the conflicting representation claims on the basis of proof which the employer deems sufficient but which is not necessarily conclusive. Moreover, the effect of such conduct is to accord unwarranted prestige and advantage to one of two competing labor organizations and thereby prevent a free choice by the employees.

Where, as in the instant case, the Board finds that an employer has violated Section 8 (1) of the Act, within the meaning of the *Midwest Piping* rule, it seeks to remedy the unlawful assistance to the recognized union and interference with the employees'

free choice of representatives, by requiring the employer to withhold exclusive recognition from the union, unless and until the union is certified by the Board. Of necessity the remedy also requires that the employer cease giving effect to its exclusive recognition contract with the assisted union. Where, as here, the contract provides, not merely for exclusive recognition, but also for a closed-shop, the impact of the employer's interference and assistance is aggravated but the applicable principle under discussion remains the same. *Eleventh Annual Report, supra,* pp. 36–37.

The specific question before the Court is whether the Board's *Midwest Piping* rule, as applied in the instant case, represents a reasonable, and therefore valid, accommodation of conflicting interests to the effectuation of the basic purpose and policy of the Act.[2] We submit that it does and that we have so demonstrated in our main brief. However, we believe certain arguments and assertions made by respondent and the A. F. L. in their briefs, and not anticipated in the Board's main brief, require reply.

As the Board has observed (R. 76–77) the rule itself is not founded upon novel concepts. It is

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[2] Compare this Court's observation in *Local 2880* v. *N. L. R. B.*, 158 F. 2d 365, 368, certiorari granted, 331 U. S. 798, and dismissed on motion of petitioner, 332 U. S. 845, that the Board's interpretation and application of the terms of the proviso to Section 8 (3) of the Act to the fact situation there presented, "is so obviously rational that we well could be required to accept it under the rule that upon 'questions of law the experienced judgment of the Board is entitled to great weight.' *Medo Corporation* v. *N. L. R. B.*, 321 U. S. 678, 681."

founded upon the basic and well settled proposition that in a contest between unions for the role of exclusive bargaining representative of his employees, an employer is bound by the Act to refrain from bringing the weight of his economic power to bear in favor of one union as against another.[3] The net effect of the *Midwest Piping* rule is that the Board, after weighing the competing factors in favor of the policy of protecting employees' freedom of choice on the one hand, and in favor of a policy of stability on the other, came to the conclusion, as it did also in the *Local 2880* case, *supra,* enforced by this Court, that the factors in favor of freedom of choice outweighed those in favor of stability in the given circumstances. The Board concluded that where an employer knows than an unresolved question is pending before the Board concerning which of two competing unions the employees desire as their bargaining representative, and, nevertheless, grants exclusive recognition to one of these unions, he has, in effect, taken the choice out of his employees' hands and made his own choice for them, and that the harm flowing from such invasion of the employees' freedom of choice outweighs any competing advantage of stability which the employer and the favored union may advance to justify it.

Certainly, the underlying philosophy of the Act, as originally passed and as amended, which is to the

[3] That, of course, is what we have reference to in the discussion in our main brief (p. 10) of an employer's duty of neutrality. We are not concerned with the mere expression of views, arguments, or opinions embraced in the protections of the First Amendment and Section 8 (c) of the Act, as amended.

effect that the stability of relations to be achieved by collective bargaining should be founded upon the free choice of representatives by employees, rejects the stability which is built upon the precarious foundation of the denial to employees of a freedom of choice. That is the basic reason underlying the judicial affirmation and approval of the Board's power to invalidate contracts with unions found to be employer dominated,[4] or assisted,[5] and of the Board's power to invalidate contracts made even with majority representatives when used to repress employees in the exercise of the freedoms guaranteed them by the Act.[6]

The initial responsibility for weighing these competing factors lies with the Board. The Board came to its conclusion after careful deliberation, and after according full weight to the conflicting considerations involved. Certainly, a conclusion calculated to protect the basic freedoms guaranteed by the Act should not, as the employer and the A. F. L. here seek to have the Court do, be lightly set at naught.

2. The contention that respondent did no more than maintain the status quo in its relations with the A. F. L., and that the Board could not properly find such conduct violative of the Act

Respondent's major contention appears to be that it did no more than maintain the *status quo* in its relations with the A. F. L., after the Board's admo-

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[4] *N. L. R. B.* v. *Pacific Greyhound Lines*, 303 U. S. 272.

[5] *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. 2d 652 (C. C. A. 9); *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72.

[6] *Wallace Corporation* v. *N. L. R. B.*, 323 U. S. 248; cf. *Local 2880* v. *N. L. R. B.*, *supra*.

nition in its supplemental decision of February 15, 1946, in *Matter of Bercut-Richards Packing Co. et al.*, 65 N. L. R. B. 1052, that none of the employers there concerned should, pending a new election, give preferential treatment to any of the labor organizations involved (R. 58–59). Respondent contends, further, that the Board could not properly find that mere maintenance of the *status quo* which, it says, meant simply continuing to recognize the A. F. L. as the exclusive representative of respondent's employees, and the renewal or extension of its closed-shop contract with the A. F. L., constituted preferential treatment of the A. F. L., and unlawful interference with its employees' rights under the Act (Resp. Br., pp. 12, 17–18, 23, 37–39, 60–64).

But this is the very thing the Board indicated, in the Supplemental Decision referred to, that respondent could *not* do. The Board recognized the right of the employers involved in the *Bercut-Richards* case to carry out their current collective agreements to their expiration date [7] but stated that "none of the unions is entitled to an exclusive status as the bargaining agent after that date" (R. 58–59).

[7] Respondent's contention that the Board's recognition of this right renders the *Midwest Piping* rule "inconsistent" is without merit (Resp. Br., pp. 33, 37–39). As we have noted, the rule itself, represents a balancing of interests which arise from the sometimes conflicting aims of the Act to secure the employees' freedom of choice of representatives and, at the same time, to promote stability of the bargaining relationship. The Board's determination that the freedom-of-choice principle should not be accorded unrestrained effect certainly does not make unreasonable or inconsistent the determination that the stability principle must also be subjected to some limitations.

Respondent apparently concedes that the *Midwest Piping* rule would be valid if its application were limited to cases in which the employer, while a representation question is pending before the Board, grants an exclusive recognition contract to a union when no union has been so recognized by the employer before (Resp. Br., p. 38). Respondent agrees that such "a contract would confer a standing upon the newly recognized union which it did not have before, and would be taken by the employees within the bargaining unit to demonstrate a preference by the employer for the union so favored" (Resp. Br., p. 17). Respondent, therefore, does not appear to challenge the validity of the basic principle upon which the rule is founded. Respondent, rather, challenges the propriety of the Board's application of the rule to the fact situation presented by the instant case.

But the line which respondent seeks to draw between a proper application of the rule, and an improper one, is exceedingly fine. The difference between the Board's position and respondent's, in this respect, is one of degree rather than principle. The whole point of the *Midwest Piping* rule is that the filing of a petition ordinarily places in doubt the majority status of any union claiming to represent the employees, whether it is an incumbent majority representative or a new claimant. The pendency of the representation question before the Board, therefore, calls with particular urgency for a hands off policy on the part of the employer. While it is true that the granting by an employer, during the pendency

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of a representation proceeding, of exclusive recognition to a union which it has not theretofore recognized, may be more acute in its immediate impact than the same grant to a union with which he has theretofore had bargaining relations, the difference is one of degree only. In either case, the employer has acted to take the choice from out of the hands of the employees and has made it for them. In either case, the employer has snatched the subject matter of the controversy out of the hands of the tribunal which was constituted by law to resolve it, and substituted its own fiat for the will of the employees which was to be expressed before that tribunal through a free election. And in either case, the employer confers upon the recognized union the potent assistance which is inseparable from a grant of exclusive recognition. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267.

The validity of the Board's *Midwest Piping* rule, and the propriety of its application herein, thus does not turn upon the question whether, following the Board's supplemental *Bercut-Richards* decision, respondent granted the A. F. L. rights it had not previously enjoyed, or merely maintained the *status quo* in its relationship with the A. F. L. If the rule itself is valid, and it is, then it applies regardless of whether respondent, on March 5, 1946, recognized and made a closed-shop contract with the A. F. L. for the first time, or merely renewed an existing contract. Respondent's contention that it did no more than

maintain the *status quo,* is entirely irrelevant, as is its extended discussion in proof of that assertion. However, since respondent contends that the Board incorrectly stated in its main brief that respondent did more than continue the arrangement which had theretofore existed with the A. F. L., we shall answer the contention briefly.

Respondent says that the Board's main brief is "misleading, particularly in omitting the crucial fact that for at least five years the respondent and the A. F. L. had been parties to a *closed-shop contract* and that the contract attacked in these proceedings was merely an extension or reaffirmation of that contract" (Resp. Br., p. 2), and that the Board's brief "incorrectly states 'that the employer had gone beyond the requirements of the old agreement' " (Resp. Br., p. 8).

The Board made no finding that respondent had maintained a closed-shop agreement with the A. F. L. for five years prior to March 1946. The Board did find, however, that "At least the contract expiring March 1, 1946, between the A. F. L. and respondent included a closed-shop provision" (R. 87, 95). The closed-shop provision referred to was contained in the supplemental agreement between respondent and the A. F. L. which embodied matters not covered by the Master Agreement (R. 87). Since the supplemental agreement expiring on March 1, 1946, is not in evidence (R. 87), it is impossible to determine on this record what difference there may have been be-

tween that agreement and the one executed by respondent and the A. F. L. on March 5, 1946, which is the contract here under attack (R. 127–129). But it is a fair inference that the terms of the two agreements were not identical. For if they were, why execute a *new* contract to maintain the *status quo* when the *status quo* is already maintained by virtue of the automatic renewal clause in the old contract? Respondent states that the supplemental agreement expiring March 1, 1946, automatically renewed on January 30, 1946, to run for another yearly term to March 1, 1947 (Resp. Br., p. 66). That respondent should have executed a *new* contract to supplant one which was already in effect by virtue of renewal, would indicate that something more than the *status quo* was intended and that something more was achieved.

Respondent's version of the facts, we submit, supports the statement in the Board's main brief that respondent entered into a *new* closed-shop contract with the A. F. L. on March 5, 1946, and that respondent was then "of his own accord" favoring the A. F. L. (Board's Main Br., pp. 21, 30–31). If respondent had been as intent upon merely maintaining the *status quo,* as it says it was, it would have allowed the contract, which it claims was then current, to run out its term until March 1, 1947.

3. The contention that the cases cited by the Board do not support its position

Respondent contends (Resp. Br., pp. 28–32) that *N. L. R. B.* v. *Southern Wood Preserving Co.,* 135 F.

2d 606 (C. C. A. 5), and *N. L. R. B.* v. *John Englehorn & Sons,* 134 F. 2d 553 (C. C. A. 3), cited by the Board at page 18 of its main brief, do not support the Board's position. A brief analysis of these decisions demonstrates that the contrary is true.

In the *Southern Wood Preserving* case, *supra,* one of the factors which entered into the Court's decision upholding the Board's finding of unlawful interference and assistance on the part of the employer was the latter's "premature signing of a new contract" with one union, while a rival union's petition for certification was pending before the Board (135 F. 2d, at p. 607). In this respect, we submit, the case is clearly analogous to the instant case and supports the principle upon which the Board's decision herein rests. That the different facts in the *Southern Wood Preserving* case called for a remedial order different from the order herein (Resp. Br., pp. 31–32), does not destroy the analogy.[8]

[8] In the *Southern Wood Preserving* case the employer contracted with the A. F. L. while a C. I. O. petition for certification was pending. When the C. I. O. subsequently won a Board election, the employer abandoned the A. F. L. and contracted with the C. I. O. The Board's order did not require the employer to cease bargaining with the assisted A. F. L. or giving effect to its A. F. L. contract, because at the time of the order the employer had neither bargaining relations nor a contract with the A. F. L. The Board's order, *inter alia*, required the employer to cease interfering with its employees' exercise of their organizational rights. In enforcing the order the Court observed that the signing of the contract with the C. I. O., following the employer's unlawful assistance to the A. F. L., did not make the order moot, since there "is no certainty that the rivalry between the unions is dead, or that the Company will not again take sides" (135 F. 2d, at p. 607).

In the *Engelhorn* case, *supra,* while a C. I. O. petition for certification was pending before the Board, the employer made a closed-shop contract with the A. F. L., with which it had had an exclusive bargaining contract for approximately the past three years (134 F. 2d, at p. 555). The Board found that this conduct, as well as other conduct by the employer, constituted interference in violation of Section 8 (1) of the Act and the Court declined to pass on this point specifically (*id.,* at p. 556). The Court enforced the Board's order requiring the employer, *inter alia,* to cease giving effect to its closed-shop contract with the A. F. L., on the ground that the Board had properly found that the employer had unlawfully assisted the A. F. L. by various acts prior to the execution of the contract. Since the contract was thus made with an improperly assisted union, it was held invalid under the proviso to Section 8 (3) of the Act (*id.*, at p. 556). After reciting numerous other acts of assistance, however, the Court declared that, "the quick execution of the closed shop agreement, at a time *when the employer knew of claims by another labor organization that it represented a majority of the employees, is itself* evidential of assistance to the contracting union" (*ibid.*). [Italics supplied.] We submit, therefore, that the *Engelhorn* case supports in principle the proposition for which the instant case stands.

4. The contention that the Board's *Midwest Piping* rule is arbitrarily applied

Respondent cites three recent decisions of the Board which it says demonstrate that the *Midwest Piping* rule stands for an arbitrary principle which is arbitrarily applied by the Board and is, therefore, improper (Resp. Br., pp. 19–28). See also the A. F. L.'s Brief, at pp. 26–35. The three cases are *Matter of Ensher, Alexander & Barsoom, Inc.,* 74 N. L. R. B. 1443; *Matter of Ellis Canning Company,* 76 N. L. R. B. 99; and *Matter of Eaton Manufacturing Company,* 76 N. L. R. B. 261. Basically respondent's complaint is that, since the Board did not apply the *Midwest Piping* rule to the facts involved in these three cases, it should not have applied it in the instant case. The three cases in question, we submit, are clearly distinguishable.

The Board found the *Midwest Piping* rule inapplicable to the *Ensher, Alexander & Barsoom* case because, at the time the company executed its contract with the A. F. L. in that case, the only rival union involved, an independent, had become defunct, and there was no other claim that the A. F. L. did not, in fact, represent a majority of the employees. The A. F. L. was the only union seeking recognition as the employees' representative at the time the employer granted it such recognition. As the Board found, there were "no actual conflicting claims" and there was "in actual fact no real question concerning representation of the respondents' employees to be resolved" (74 N. L. R. B., at pp. 1444–1445).

We submit that the Board's reluctance to apply the *Midwest Piping* rule indiscriminately to the foregoing clearly distinguishable circumstances, does not render the rule arbitrary. Indeed, it more reasonably appears to demonstrate the contrary.[9]

It is to be noted that in the instant case, at the time it renewed its contract with the A. F. L., respondent had been informed officially by the Board that a representation question existed, and had been admonished by the Board not to grant exclusive recognition to any union pending a new election (R. 58–59).

In *Matter of Ellis Canning Company,* 76 N. L. R. B. 99 (cited, Resp. Br., pp. 21–23), the facts were entirely different from those in the instant case or in any case where the *Midwest Piping* rule would ordinarily apply. In the *Ellis Canning* case the C. I. O. filed a representation petition in the middle of the term of the company's closed-shop contract with the A. F. L. When the A. F. L. insisted upon enforcement of its closed-shop agreement, a number of employees were discharged because they refused to join the A. F. L. This, of course, is the normal manner in which a closed-shop agreement operates. An un-

[9] Respondent's contention that the Board's direction of election at the *Ensher* plant, dated August 16, 1946, with both the C. I. O. and the A. F. L. on the ballot, shows that there was in fact a question concerning representation at the plant on February 27, 1946, when the contract with the A. F. L. was made (Resp. Br., pp. 20–21), is without merit. The C. I. O. claim did not arise until nearly six months after the execution of the contract with the A. F. L., as the Board specifically noted (74 N. L. R. B., at p. 1444, n. 4).

usual element in the case, however, was the fact that for approximately one year preceding the filing of the representation petition by the C. I. O., the company and the A. F. L. had, by mutual agreement, refrained from enforcing the closed-shop provision of their contract. This situation gave rise to the question whether, when enforcement of the closed-shop provision was resumed after the rival C. I. O. filed its representation petition, the company was violating its obligation to keep its hands off the representation controversy then pending before the Board.

The Board held that the fact that the company and the A. F. L. had voluntarily suspended the closed-shop provision of their contract did not mean that they had waived the right to enforce it thereafter if they so desired. Insofar as its enforcement may have marked a "departure from neutrality," as respondent states (Resp. Br., p. 23), it was a departure which the Act permitted by virtue of the valid closed-shop contract which ante-dated the raising of the representation question by the C. I. O. Since the contract, in terms, required the employees to belong to the A. F. L. as a condition of employment, the employees had no right under the Act to insist upon employment without fulfilling the required condition.

All the Board did in the *Ellis Canning* case was recognize that the parties had legitimate contractual rights and obligations which did not contravene the purpose and policy of the Act. Similarly, in the instant case the Board recognized that the parties had

a right to carry out the provisions of their contract which was in existence at the time the representation question arose (R. 58–59). In the instant case, however, unlike the *Ellis Canning* case, the employer not only carried out the existing contract to its termination but, thereafter, entered into a new contract for a new term, thus bringing the case within the *Midwest Piping* rule.

Matter of Eaton Manufacturing Company, 76 N. L. R. B. 261 (cited, Resp. Br., pp. 23–27), is not inconsistent with the instant case. In that case, as here, the employer executed an exclusive bargaining contract with the A. F. L. while a petition for representation, filed by the C. I. O., was pending before the Board. There, however, after the C. I. O. filed its representation petition, it also filed with the Board a charge alleging that the employer had engaged in unfair labor practices. Ordinarily, the Board, as a matter of policy, will not process a representation petition while unfair labor practice charges are outstanding, unless the charging union executes a waiver of its right to urge the unfair labor practices as objections to any election which may be held.[9a] National Labor Relations Board, *Twelfth Annual Report, supra,* at p. 14. The C. I. O. did not waive its charges in the *Eaton* case and the Board therefore was unable to make a "prompt determination" of the representa-

[9a] The rationale of this policy is that, otherwise, if the union lost it could object that its loss of adherents was due to the unfair labor practices, and ask the Board to set the election aside on that ground.

tion question raised by the C. I. O.'s petition, because of the necessity of determining the merits of the C. I. O.'s unfair labor practice charges. The Board subsequently found that the intervening unfair labor practice charges were "groundless."

In these circumstances, the Board held that the *Midwest Piping* rule was not properly applicable to the *Eaton* case. The basis for the Board's decision was that the petitioning union, by its own act of filing a meritless charge, was itself responsible for unjustifiably delaying the Board's determination of the representation question, and that it would not serve the Act's objectives to permit such meritless charges to form the basis for indefinitely suspending collective bargaining with a proper representative. Clearly, if one of two competing unions, having raised a representation question by filing a petition, were permitted, by the mere filing of a groundless unfair labor practice charge, to postpone indefinitely the Board's resolution of the representation question, and thereby to suspend indefinitely the normal operation of the collective bargaining process, the purpose of the *Midwest Piping* rule, and of the Act, would be defeated.[9b]

We submit that the Board's recognition that an abuse of the *Midwest Piping* rule "can easily operate in derogation of the practice of continuous collective bargaining" (*the Ensher, Alexander & Barsoom* case,

[9b] That decision does not imply, as respondent suggests (Resp. Br., p. 27), that the *Midwest Piping* rule is inapplicable *wherever* an abnormal delay occurs, regardless of the nature of the cause of the delay.

supra, 74 N. L. R. B., at p. 1445; *Twelfth Annual Report,* p. 26), and that therefore the rule is to be applied "with caution" (*ibid.*), as shown by the cases here under discussion, demonstrates the reasonableness and the soundness of purpose with which the Board has applied the rule.

5. The contention that the *Midwest Piping* rule is contrary to law

At pages 40 to 57 of its brief respondent argues that the Board's *Midwest Piping* rule is contrary to law. The A. F. L. makes a similar argument at pages 39 to 57 of its brief. Both of these parties suggest that the net effect of the Board's rule is to require the affected employer to bargain with two unions or several unions, instead of with one union as the Act contemplates. This is not an accurate representation of the effect of the Board's rule. The rule, as we have seen, simply requires the employer to refrain from entering into a new exclusive bargaining or closed-shop contract, or from renewing an old contract beyond its current term, while a representation question is pending before the Board. The Board stated, in its Supplemental Decision in the *Bercut-Richards* case (R. 58–59), that the affected employers "*may* recognize each * * * [union] as the representative of its members" (R. 59). [Italics supplied]. But this does not mean, as respondent and the A. F. L. state, that the employer is *required* to recognize each competing union as representative of its own members. It is merely another way of stating

the degree of neutrality of action required of the employer pending the Board's disposition of the representation question, and means only that if he grants such recognition to one union, he must do so for any union claiming members in the unit.

We discuss below the cases which respondent and the A. F. L. contend show the Board's *Midwest Piping* rule to be contrary to law.

(a) *N. L. R. B.* v. *Pacific Greyhound Lines, Inc.*, 106 F. 2d 867 (C. A. 9)

The fact that the *Pacific Greyhound* case was a contempt proceeding places it in a posture entirely different from the instant case, which is an enforcement proceeding under Section 10 (e) of the Act. In the *Pacific Greyhound* case this Court said, "What we are to determine is whether there has been a contempt of our decree enforcing the Board's order. That is to say, whether what Greyhound did * * * is something of the same nature it was shown to have been doing in the proceeding leading to the Board's order * * * or whether it was something different in kind from that from which it was ordered to cease and desist" (106 F. 2d, at p. 870). The question in such a case then, is not the broad question of whether the Act has been violated, but the considerably narrower question of whether the employer has failed to comply with the terms of the court's decree. This Court's decision in the *Pacific Greyhound* case, therefore, was not whether the alleged conduct of the employer violated the Act, but whether it violated the Court's decree. Specifically, the Court held that the

alleged acts of the employer were "essentially different in kind from those raised in the proceeding in which our decree enforcing the Board's cease and desist order was granted," and, that, therefore, the Board's petition did "not allege facts constituting a contempt of this court * * *" (*id,* at p. 871).

We submit, therefore, that insofar as the employer's modification or extension of a closed-shop contract while a representation question was pending before the Board, may have constituted part of the conduct alleged by the Board to have been in contempt of the Court's decree in the *Pacific Greyhound* case, the Court's decision stands only for the proposition that such alleged conduct was not related to the conduct from which the employer was ordered to cease and desist and was, therefore, not in contempt of the Court's decree. The decision cannot properly be taken as ruling upon the question whether such conduct constitutes a violation of the Act.

(b) *N. L. R. B.* v. *Bercut-Richards Co.* (C. A. 9), No. 9499, decided July 15, 1946

This *Bercut-Richards* case was also a contempt proceeding and the considerations we have just discussed with respect to the *Pacific Greyhound* case, *supra,* apply to it as well. The question before the Court was whether the conduct of the employers occurring in 1946 constituted a violation of the Court's decree entered upon consent of the parties. The consent decree enjoined the employers from engaging in certain proscribed acts of discrimination, coercion, and interference against their employees (Resp. Br., Ap-

pendix, pp. i–iii). The respondents in that case cited the earlier *Pacific Greyhound* case on the proposition that the 1946 occurrences were remote in time and not related to the conduct which culminated in the 1940 decree and, hence, were not encompassed by the degree. We submit that the fair construction to be placed, therefore, upon the Court's denial, without opinion, of the Board's petition to adjudge the employers in contempt in that case is that it was a reaffirmation of its doctrine in the *Pacific Greyhound* case, that a decree may not be construed to encompass later conduct, remote in time and not related to the conduct involved in the proceeding in which the decree was rendered.

We submit that the instant case presents an entirely different question, even though the essential facts which gave rise to the instant case are the same as those presented to the Court in the *Bercut-Richards* contempt case. In the latter case the Court did not have before it the "original consideration" of the Board (the *Pacific Greyhound* case, 106 F. 2d at p. 871), that the conduct in question constituted a violation of Section 8 (1) of the Act, without regard to any outstanding decree of the Court.

(c) *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197, and *N. L. R. B.* v. *McGough Bakeries Corp.*, 153 F. 2d 420 (C. C. A. 5), enforcing, as modified, 58 N. L. R. B. 849

As pointed out in the Board's main brief (p. 28, n. 11), the *Consolidated Edison* case has no bearing upon the issue here. In the *Consolidated Edison* case the employer did not grant exclusive recognition

to one of the competing unions. It simply contracted with the union as representative of its members only (305 U. S. at p. 237). This type of recognition, as the Board has specifically stated in the instant proceeding (R. 59), is permissible under the *Midwest Piping* rule.

The *McGough Bakeries* case, *supra,* as pointed out in the Board's main brief (pp. 19–20, n. 9), did not involve an adjudication of the question presented here. In that case, the employer's granting a closed-shop contract to one of two competing unions while a representation petition was pending before the Board, was merely a circumstance but not a ground of decision. Invalidity of the contract was predicated solely upon the ground that, prior to its execution, the employer unlawfully assisted the union by various acts and failed to require proof of the union's alleged majority status (58 N. L. R. B., at pp. 851, 873). The Court was of the opinion that the Board's factual findings of assistance lacked support in the evidence, thereby undermining the foundation, in no way here involved, for the Board's conclusion of invalidity in that case. (153 F. 2d, at p. 425).

6. Board proceedings subsequent to the filing of its main brief

The representation proceeding bearing on this case is described, in part, at pages 3 to 6 of the Board's main brief. As part of that proceeding further elections were conducted by the Board on August 29 and 30, 1946, at the various plants involved, including respondent's plant. Upon objections filed by the

C. I. O., the Board made an extensive investigation of the conduct of the elections.

The investigation was not completed at the time the amendments to the Act became effective on August 22, 1947. On September 4, 1947, certain of the employers concerned filed a motion to dismiss the entire representation proceedings. Thereafter, on October 31, 1947, the A. F. L. filed with the Board a motion to dismiss the objections to the election and to certify the A. F. L. as the bargaining representative of the employees involved. On January 19, 1948, the Board heard oral argument on these motions. Counsel for the employers, the C. I. O., and the A. F. L., participated. On January 20, 1948, the Board issued an order dismissing the petitions for investigation and certification of representatives (see Appendix A, *infra,* pp 30–32). The basis for the Board's action was that the C. I. O. had not complied with the reporting and filing requirements of Section 9 (f), (g), and (h) of the Act, as amended (see Appendix B, *infra,* pp. 33–36), and that those portions of the Act precluded the Board from certifying, or investigating a representation question raised by a noncomplying labor organization. *Matter of Rite-Form Corset Company, Inc.,* 75 N. L. R. B. 174; *Matter of Monumental Life Insurance Company,* 75 N. L. R. B. 776.

The A. F. L. contends (A. F. L. Br., pp. 43–44) that the dismissal of the petitions leaves the parties in *status quo,* as if the petitions had never been filed, and that, therefore, the *Midwest Piping* rule, which

turns upon the existence of the representation question raised by these petitions, is not properly applicable here. But this contention overlooks the fact that these petitions were valid when they were filed. They legitimately raised a representation question which existed, in fact, at the time respondent and the A. F. L. entered into their new contract on March 5, 1946. The question before the Court is whether the Board could properly find, as it did, that respondent's conduct in this respect unlawfully interfered with its employees' exercise of their freedom of choice of representatives. Certainly the fact that the Board subsequently was precluded from further processing of the petitions because of the C. I. O.'s disqualification by reason of the amendments to the Act cannot operate retroactively to deprive the employees of the protection to which the Act entitled them at the time respondent committed its interference.[10] *N. L. R. B.* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660, 662 (C. C. A. 2); *N. L. R. B.* v. *Mylan-Sparta Co., Inc.,* 166 F. 2d 485, 487–488 (C. C. A. 6). We submit that if the *Midwest Piping* rule is valid, the propriety of its application herein is not affected by the Board's dismissal of the petition which raised the representation question in this case.[11]

[10] Manifestly, the A. F. L.'s contention that if the Board is upheld here non-complying unions will be enabled to halt legitimate bargaining between employers and qualifying unions, is without merit (A. F. L. Br., p. 44). As the instant case demonstrates (*supra*, pp. 24–25), the Board will not investigate petitions by non-complying unions.

[11] It is true, as respondent states (Br., pp. 10, 64), that the representation petition involved herein was filed by the independent Cannery and Food Process Workers Union (R. 509–510).

N. L. R. B. v. *Grieder Machine Tool & Die Company,* 142 F. 2d 163 (C. C. A. 6), enforcing 49 N. L. R. B. 1325, certiorari denied, 323 U. S. 724, cited by the A. F. L. (Br., p. 43), is not in point. There a rival union sought to raise a representation question by filing a petition with the Board less than 3 months after the majority representative had been certified by the Board (142 F. 2d, at p. 165). The Board refused to entertain the petition on the ground that its recent certification of the nonpetitioning union was still in force and effect (49 N. L. R. B., at pp. 1344–1345). The employer was found to have violated the Act by refusing to bargain with the certified union both before and after the Board had rejected the rival union's petition. The Court held that, in view of the certification, the employer's "duty was to continue negotiations [with the certified union] and if it had any doubt as to its rights it might have resorted to the Board for clarification" (142 F. 2d, at p. 165). The instant case did not involve a recent

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There is no question, however, as to the status and interest of the C. I. O. in the representation proceeding which followed the filing of the petition. That proceeding was consolidated with a large number of other similar proceedings which arose upon petitions filed by either the Cannery and Food Process Workers Union or the C. I. O. (R. 21–23). During the course of the hearing in the representation proceedings, the Board granted the motion of the C. I. O. to intervene in all proceedings in which it had not filed a petition. In its original decision and Direction of Election, following the hearing in the consolidated representation proceeding, the Board observed that the C. I. O. had made a showing of representation in all of the various units involved, with one exception (R. 28–29, notes 9 and 10), and accorded the C. I. O. a place on the ballot in all of the elections except that one (R. 28–29, notes 9 and 10, 34–35, 45–47).

certification by the Board which had not yet had a reasonable chance to operate. Respondent and the A. F. L. had enjoyed an extended bargaining relationship and there is no question but that the period was appropriate for entertaining a petition to determine the employees' choice of representatives. The Board had so determined in the representation proceeding and had informed respondent, in no uncertain terms, as to the impact of the pending representation question upon its bargaining rights and obligations (*supra,* pp. 5–6).

The *Grieder* case is simply one of a number of cases in line with the Board's settled policy of holding that the certification of a union as bargaining representative, or a union's execution of a valid contract recognizing it as exclusive bargaining representative, entitles the union and the employer to a period of stability during which the union's representative status is not subject to attack. During such stability period, which usually extends either for about a year in the case of a certified union without a contract, or for the major part of the term of the contract, where one exists, the Board will not entertain a petition for investigation of representatives. *Matter of Kimberly-Clark Corporation,* 61 N. L. R. B. 90, 92–93; *Matter of Leo Hart Co., Inc.,* 26 N. L. R. B. 125, 127–129; *Matter of Detroit and Cleveland Navigation Co.,* 29 N. L. R. B. 176, 178–180; the Board's *Twelfth Annual Report, supra,* at pp. 13–14. Cf. *N. L. R. B.* v. *Century Oxford Mfg. Corp.,* 140 F. 2d 541 (C. C. A. 2), certiorari denied, 323 U. S. 714.

The Board has been mindful, however, that its stability policy should not be applied so rigidly as to

encroach unduly upon the employees' right to choose and change their representatives. To this end the Board has recognized that during a "reasonable" period prior to the end of a contract term the employees, although bound to the contracting union as their exclusive representative for the entire contract term, may raise a representation question for the purpose of making a new determination of representatives for the period following the term of the current contract. Depending upon the circumstances of the case, such "reasonable" period may be as much as the two or three months preceding the termination date of the contract. *Matter of Clark Bros. Co., Inc.*, 66 N. L. R. B. 849, 851; *Matter of the Flintcote Co.*, 55 N. L. R. B. 1442, 1443; *Matter of Chrysler Motor Parts Corp.*, 38 N. L. R. B. 1379, 1381; *Matter of Houde Engineering Corp.*, 36 N. L. R. B. 587, 589; the Board's *Twelfth Annual Report, supra,* at pp. 9–10.

The *Midwest Piping* rule, as we have seen, is applied by the Board in keeping with these reasonable principles which the Board has established in the administration of the employee-representation provisions of the Act.

Respectfully submitted.

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November 1948.

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 20–R–1414, et al.

In the Matter of BERCUT-RICHARDS PACKING COMPANY, ET AL., and CANNERY AND FOOD PROCESS WORKERS COUNCIL OF THE PACIFIC COAST AND ITS AFFILIATED UNIONS: FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, CIO

ORDER DISMISSING PETITIONS

Upon petitions duly filed, the National Labor Relations Board, herein called the Board, conducted elections on August 29 and August 30, 1946, among employees of California Processors and Growers Inc., herein called CP&G, and among employees of independent companies involved, to determine whether the employees in the several units desired to be represented by the Petitioner, Food, Tobacco, Agricultural and Allied Workers of America, CIO, or by California State Council of Cannery Workers Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, the Intervenor herein, for the purposes of collective bargaining, or by neither.

At the close of the election in the CP&G unit, a Tally of Ballots was furnished the parties. The Tally showed that of 31,832 valid votes cast, 14,896 were cast for the Petitioner; 16,262 were cast for the Inter-

venor, 674 were cast for neither labor organization, and 2,056 were challenged ballots.

On September 9, 1946, the Petitioner filed objections to the conduct of the elections, with the exception of those elections which had been conducted among the employees of certain of the independent companies.[1]

Thereafter, upon a motion filed on July 31, 1947 by the Regional Director of the Board for the Twentieth Region suggesting procedural steps to be taken on these proceedings, and upon motions severally filed by the CP&G on September 4, 1947, requesting that the motion of the Regional Director be denied and that these proceedings be dismissed, and by the Intervenor on October 31, 1947, requesting that the objections to the election be dismissed and that the Intervenor be certified as the bargaining representative, a hearing for the purpose of oral argument was held before the Board on January 19, 1948 at Washington, D. C. The Companies, the Petitioner, and the Intervenor appeared by counsel and presented argument.

The Board has considered these motions and the oral argument. It is clear, in view of the objections and challenges, that the results of the elections are inconclusive, and that further investigation by the Board would be required to make such elections determinative. The Petitioner has failed to comply with the filing requirements of Section 9 (f), (g), and (h) of the Act. The Board is, accordingly, precluded from continuing any investigation of these

[1] Of the elections among employees of the independent companies, some were conclusive and resulted in the issuance of Board certifications before August 22, 1947. The remaining independent elections are in the same posture as that of the election in the CP&G unit because of objections filed by the Petitioner herein.

questions concerning representation.[2] The proceedings must therefore be dismissed.

ORDER

IT IS HEREBY ORDERED that the petitions for investigation and certification of representatives filed by the Petitioner with respect to employees of California Processors and Growers Inc., and the independent companies involved herein, wherein no certification issued before August 22, 1947, be and they hereby are dismissed.

By order of the Board:

Signed at Washington, D. C., this 20th day of January 1948.

FRANK M. KLEILER,
Executive Secretary.

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[2] See *Matter of Rite-Form Corset Company, Inc.*, 75 N. L. R. B., No. 14; *Matter of Monumental Life Insurance Company*, 75 N. L. R. B., No. 93.

APPENDIX B

Pertinent portions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised

by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowance for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f)

authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefore;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor

organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

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